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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No.....

UNITED STATES LINES COMPANY,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on October 5, 1954.

OPINION BELOW.

The opinion of the United States Court of Claims printed in Appendix B hereto, *infra,* page 15, is reported at 124 F. Supp. 375.

JURISDICTION.

The order and judgment of the United States Court of Claims was entered on October 5, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., §1255 (1).

Question Presented.

Does the United States Court of Claims have jurisdiction of a suit to recover indemnity under a policy of war risk and indemnity insurance written by the respondent, United States of America and issued to the petitioner, United States Lines Company with respect to a vessel privately owned and operated by the United States Lines Company, but under charter to the United States of America, or has the Court of Claims been ousted of jurisdiction by the Suits in Admiralty Act, 46 U. S. C. §741 *et seq.* and by the War Risk Insurance Act, 46 U. S. C. §1128d *et seq.*, despite its repeal long before the cause of action sued on arose.

Statutes Involved.

The statutory provisions involved in this suit are:

Suits in Admiralty Act, 46 U. S. C. Section 741, *et seq.;*

War Risk Insurance Act, June 29, 1940, 54 Stat. 689, 46 U. S. C. §1128d;

Act of July 30, 1947, Chap. 388, §1, 61 Stat. 633, 1 U. S. C. §109;

Joint Resolution of July 25, 1947, Chapter 327, Section 1, 61 Stat. 449, 450, repealing 46 U. S. C. Sec. 1128d.

The text of these statutes are printed in Appendix A hereto, *infra* page 12 *et seq.*

Statement.

Petitioner filed this suit against the United States of America on April 10, 1953. The petition (R. 1-27) alleges substantially as follows:

The United States Lines Company was sued by its seamen for injuries they sustained when the company's vessel was torpedoed on September 14, 1942. This suit was settled and the United States Lines has made claim against the United States of America to recover the sums paid to the seamen because it was claimed the United States had insured the United States Lines Company for such a loss. The United States disputes its liability under the policy. To understand the position of the parties, it is necessary to set forth their relations chronologically.

On March 10, 1942 the United States Lines Company, as owner and operator of the MV *American Leader,* entered into a time charter agreement, contract number WSA-2074-R, dated as of April 4, 1942, with the United States of America. By the terms of said charter the administrator of the War Shipping Administration agreed to provide and pay for or assume war risk protection and indemnity insurance with respect to the said vessels for the benefit of the United States Lines Company and of the administrator of the War Shipping Administration. Pursuant to said charter party and in carrying out its obligation under said charter party, the administrator of the War Shipping Administration on September 14, 1942 issued to the United States Lines Company a war risk binder No. RC594 amended, which included "War P. and I." and which specifically provided that it would cover the United States Lines Company retroactively commencing April 4, 1942 with respect to the MV *American Leader.* "P. & I." insurance indemnifies the assured for moneys spent in satisfaction of liabilities imposed on the assured because of personal injuries to crew members. At the time of the issuance of the binder, the United States of America had in its files a form of war risk protection and indemnity policy which was intended and accepted by it as the P. and I. policy

described in the war risk binder. By the terms of the binder and the policy it was provided that the United States of America would insure the United States Lines Company with respect to the MV *American Leader* for whatever was excluded from the petitioner's marine P. and I. policy by a clause reading as follows:

> "Article IX.
>
> "Section 2. The Association shall not be liable for any loss, damage or expenses sustained, directly or indirectly, by reason of:
>
> "* * *
>
> "(d) Capture, seizure (except seizure under Article IX, Section 1, Sub.—Section 10), arrest, restraint or detainment, or the consequences thereof, or of any attempt thereat, or the consequences of hostilities or warlike operations, whether before or after the declaration of war; * * *."

A copy of this marine P. and I. policy was delivered to the administrator of the War Shipping Administration on March 10, 1942.

On September 10, 1942, while on a voyage from Capetown to New York, the MV *American Leader* was shelled, torpedoed and sunk by a German enemy surface raider and certain members of her crew who survived sustained personal injuries as a result thereof and were taken captive aboard the surface raider, were thereafter delivered into the hands of the Japanese and imprisoned and interned as prisoners of war. At the termination of hostilities and upon their repatriation to the United States, certain members of the crew of the MV *American Leader* brought civil and admiralty actions against the United States Lines Company to recover damages for injuries allegedly arising out of the events during, surrounding and following the sinking

of the MV *American Leader*, including their capture and imprisonment.

Thereafter, and on October 13, 1952, an agreement was made by and between the United States Lines Company, the United States of America and the American Steamship Owners Mutual Protection and Indemnity Association, Inc. (the marine P. and I. insurer), under which it was provided that the claims of the crew members who had brought suit against the United States Lines Company were to be compromised and settled pursuant to the terms and conditions set forth in the agreement labeled and identified as contract No. MA510.

The liability of the United States Lines Company to said seamen in the aforesaid suits and the amounts paid to them in compromise and settlement thereof, together with the expenses incurred in connection with defense of these suits, including attorney's fees, were within the risks covered by the War Risk Protection and Indemnity Insurance provided by the United States of America to the United States Lines Company, and the United States Lines Company is entitled to be indemnified in accordance with the terms and conditions of the war risk protection and indemnity policy.

The government moved to dismiss the action in the Court of Claims on the ground that the action was maritime in nature, that the vessel was being operated by and for the government and that the Suits in Admiralty Act vested sole jurisdiction in the District Court to the exclusion of the Court of Claims.

The Court of Claims dismissed the action on the authority of *De La Rama S. S. Co.* v. *United States*, 344 U. S. 386. The Court of Claims agreed that the petitioner's right of action was on the war risk protection and indemnity policy

and binder and not under the charter. It held, however, that the War Risk Insurance Act of June 29, 1940 (54 Stat. 689; 46 U. S. C. §1128d), under which the insurance was issued, provided that actions on such policy had to be brought in the District Court. The Court of Claims held that the repeal of the Act by the Joint Resolution of July 25, 1947 (Chap. 327, Sec. 1, 61 Stat. 449, 450) did not terminate the liability of the government under the policy, holding that Section 13 of the Revised Statutes as Amended, Act of July 30, 1947 (61 Stat. 633, 635; 1 U. S. C. §109) kept alive any rights the United States Lines Company had under the War Risk Insurance Act, despite the fact that the rights of the Company did not arise until long after the repeal.

The Court of Claims did not pass upon the contention made by the government that the vessel was "being operated for" the United States of America within the meaning of that phraseology in the Suits in Admiralty Act, but based its opinion solely upon the finding that the repeal of the War Risk Insurance Act did not extinguish the liabilities of the government under the insurance policy written by it, because of Section 13 of the Revised Statutes (1 U. S. C. §109).

Reasons for Granting the Writ.

(1) The decision of the Court below extends the holding of this Court in the case of *De La Rama S. S. Co.* v. *United States,* 344 U. S. 386, which went no further than to decide that the District Court continued to have jurisdiction to hear causes of action which arose under the War Risk Insurance Act prior to its repeal. In the *De La Rama* case this Court stated that the object of Congress in re-enacting 1 U. S. C. Section 109 on July 30, 1947 "was to destroy rights in the future while saving those which had

accrued'' 344 U. S. 386, at page 390. However, whatever rights this petitioner had were in the future, because they did not accrue until November and December, 1952 and March of 1953, when it settled with its seamen. At the time of the repeal of Section 1128d, therefore, 1 U. S. C. Section 109 was ineffective and had no application whatever to the relations existing between this petitioner and the United States of America, for there was no penalty, no forfeiture and no liability which had been incurred by the government. The obligation of the government to indemnify in this case did not arise until after the petitioner became liable to pay and did pay the seamen who were suing it. This payment did not take place until November and December of 1952 and March of 1953.

(2) Although the Court of Claims in its opinion below did not pass upon the question of whether the District Court had jurisdiction even in the absence of the War Risk Insurance Act, it is and has been the contention of the government that the District Court has sole jurisdiction of suits of this nature under the Suits in Admiralty Act. The question presented is of extreme importance in the administration of the Suits in Admiralty Act.

It should be pointed out that this suit is on a contract of insurance and on a contract of insurance only. It is not a suit under the charter party. In that aspect of the case, the Court of Claims agreed with the contentions made by the petitioner United States Lines Company, that this suit involves a suit under an insurance policy and not a suit under a charter party. That there is a vast distinction between the two was clearly pointed out in *United States Lines Company* v. *United States,* 52 F. Supp. 758 (SDNY 1943).

The government's contention is based primarily upon the fact that the vessel involved, although owned, operated,

manned, victualed and supplied by the petitioner United States Lines Company, was nevertheless being "operated for" the government within the purview of the Suits in Admiralty Act. The fact of the matter is that the officers and crew were employed and paid by the petitioner; the vessel was stored and supplied by the petitioner; it was being operated and maintained by and for the petitioner. Pursuant to the time charter, the vessel was carrying cargo owned by the respondent, United States, and had sailed on a voyage to ports at the respondent's direction and was available for the use of the respondent in carrying cargo for the period set forth in the charter. There, the rights of the government ended.

If the government's contention is correct, one would have to assume that Congress, in enacting the Suits in Admiralty Act, intended that the government be responsible in cases where a similarly situated private shipowner would not have been responsible.

As a time charterer, the government has no responsibility for acts committed by the officers and crew of the vessel, nor is it responsible in any way for faulty navigation, nor for acts of the petitioner or its officers and crew in connection with the operation, management and control of the ship.

The Suits in Admiralty Act provides that no lien can be asserted against any ship which comes within the purview of that Act. In exchange for the release of this lien the government consents to be liable *in personam* to the same extent that a private shipowner would be liable. If the government's contention in this case that the MV *American Leader* was a vessel operated for the government within the purview Suits in Admiralty Act is correct, then in every case where the government has time chartered a vessel, the officers and crew of the vessel as well as third

parties damaged by the vessel would be deprived of their rights to a lien against the ship and would, therefore, have a substitute right *in personam* against the United States of America under the Suits in Admiralty Act. This would mean that in cases of time chartered vessels, the government would be responsible instead of the owner, despite the fact that the crew were the servants only of the owner, for which the owner would ordinarily have been responsible, and despite the fact that the owner completely operates, manages and controls the vessel. It would mean that the United States of America would be liable for injuries and acts done by the vessel, simply because the vessel was being "operated for" the government, despite the fact that as time charterer, the government had no responsibility whatever for the acts of the crew for faulty navigation or for any liability arising out of the operation, management and control of the ship. Congress could never have intended to extend the government's responsibility by such a strained interpretation of the Suits in Admiralty Act.

(3) This case also presents an important question of the scope of the Suits in Admiralty Act. Although the Court of Claims did not pass upon the contention, the government maintained below and still maintains that Section 8 of the Suits in Admiralty Act reveals an intention of Congress to grant jurisdiction over suits against the government on war risk insurance policies. But this is not so. Section 8 states that any judgment recovered may be paid by the government in certain ways. First, from an appropriation, second, from an insurance fund created to insure the risks for which the judgment was recovered and, third, any other funds specifically available to pay the judgments. However, the prerequisite to any such payment is that a final judgment shall have been rendered in a suit properly brought under the Suits in Admiralty Act. The fact that

the funds were to come from some insurance account does not mean that Congress was conferring jurisdiction over suits to recover on insurance policies.

Some suits against the government under the Suits in Admiralty Act were covered by insurance. Many others were not. Some judgments had to be paid out of an appropriation. Other judgments had to be paid out of the protection and indemnity insurance which was written to cover such risks. It was the purpose of Section 8 to make it clear that final judgment should be paid from the various sources available for the payment of such judgment. As provided by Section 8 of the Act, these could be either appropriations, insurance funds or other sources specifically created by statutes. It was the sole and only purpose of Section 8 that the final judgments properly recovered pursuant to the Suits in Admiralty Act would be paid out of the proper source. It was never the intention of Section 8 that persons insured by the government could sue the government as an insurer.

(4) This case does not present an isolated question for determination by this Court. There are several suits pending of a similar nature arising both in the Court of Claims and in the various District Courts. *Lykes Bros. S. S. Co.* v. *United States,* 124 F. Supp. 622; *Waterman S. S. Corp.* v. *United States,* 124 F. Supp. 624; *Waterman S. S. Corp.* v. *United States,* 124 F. Supp. 622. *Prudential S. S. Corp.* v. *United States,* 122 F. Supp. 164 (SDNY 1954), and *States Marine Corp.* v. *United States,* 120 F. Supp. 585 (SDNY 1954), were recently argued in the Court of Appeals for the Second Circuit on December 15, 1954. It is believed that no matter what decision that Court reaches, petitions for certiorari will be filed in this Court shortly thereafter.

There is considerable confusion as to the proper Act under which steamship companies similarly situated should

proceed. Until this Court passes upon the precise problem, this confusion will multiply. The Department of Justice has neither a fixed policy nor an understanding of which Act should apply. Compare *Prudential S. S. Corp.* v. *United States,* 122 F. Supp. 164 with *States Marine Corp.* v. *United States,* 120 F. Supp. 585.

In this case the petitioner United States Lines Company has also filed a libel under the Suits in Admiralty Act in the United States District Court for the Southern District of New York. On the one hand, it is contended by respondent that the Court of Claims has no jurisdiction because the vessel was being "operated for the government" and therefore the suit is cognizable only under the Suits in Admiralty Act in the District Court. In the District Court, however, in its answer to the petitioner's libel, the government has taken the position that the District Court does not have jurisdiction because the vessel was not being operated for the government.

To end the widespread confusion of shipowners and of the government, this Court should grant certiorari.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Cletus Keating,
Vernon S. Jones,
Counsel for Petitioner.

James B. Magnor,
Of Counsel.

APPENDIX A.

PERTINENT STATUTORY PROVISIONS.

"SUITS IN ADMIRALTY ACT"

46 U. S. C.

"§741. Exemption of United States vessels and cargoes from arrest or seizure.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, §1, 41 Stat. 525."

"§742. Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered

mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. Mar. 9, 1920, c. 95, §2, 41 Stat. 525."

"§748. Payment of judgment, award, or settlement.

Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 744 and 747 of this title, and any arbitration award or settlement had and agreed to under the provisions of section 749 of this title, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is appropriated out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement. Mar. 9, 1920, c. 95, §8, 41 Stat. 527."

"War Risk Insurance Act"

46 U. S. C.

"§1128d. Actions on claims for losses; jurisdiction of courts.

In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under sections 1128-1128h of this title, an action on the claim may be brought and maintained against the United States in the district court of the United

States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service. Said suits shall proceed and shall be heard and determined according to the provisions of sections 741-752 of this title insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of sections 1128-1128h of this title."

"JOINT RESOLUTION OF JULY 25, 1947"

Chap. 327,

"§1, 61 Stat. 449. Joint Resolution to terminate certain emergency and war powers.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following statutory provisions are hereby repealed:

• • • • • •

Act of June 29, 1940 (54 Stat. 689, ch. 447), as amended."

1 U. S. Code §109

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, §1, 61 Stat. 633.

APPENDIX B.

OPINION.

IN THE

UNITED STATES COURT OF CLAIMS

No. 140-53

(Decided October 5, 1954)

UNITED STATES LINES COMPANY *v.* THE UNITED STATES

WALTER P. HICKEY, for Plaintiff. CLETUS KEATING, VERNON S. JONES, and JAMES B. MAGNOR were on the briefs.

LEAVENWORTH COLBY, with whom was Assistant Attorney General WARREN E. BURGER, for Defendant. J. FRANK STALEY and E. ROBERT SEAVER were on the briefs.

ON DEFENDANT'S MOTION TO DISMISS PETITION

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on defendant's motion to dismiss plaintiff's petition on the ground that exclusive jurisdiction of the cause of action therein asserted is in the United States District Court sitting in admiralty.

The petition alleges that from March 10, 1942, through September 10, 1942, its motor vessel *American Leader* "was being operated for the administrator of the War Shipping Administration by the plaintiff, United States Lines Company, in accordance with a time charter agreement," under

which defendant "agreed to provide and pay for or assume war risk protection and indemnity insurance with respect to said vessel for the benefit of the plaintiff. * * *"

The vessel was shelled, torpedoed, and sunk on September 10, 1942, as a result of which certain members of her crew sustained personal injuries and were taken captive by the Germans, and interned as prisoners of war by the Japanese, to whom they had been turned over by the Germans.

After the sinking of the vessel, defendant, on September 14, 1942, issued a war risk binder with respect to the motor vessel *American Leader,* which included "War P & I" (meaning war protection and indemnity), and which provided that it should be retroactive to April 4, 1942. Subsequently, the defendant issued a War Risk Protection and Indemnity policy. It is alleged that this policy insured plaintiff, among other things, against "capture, seizure, * * * arrest, restraint, or detainment, or the consequences thereof, or of any attempt thereat, or the consequences of hostilities or warlike operations, whether before or after the declaration of war."

On the 13th day of October 1952, plaintiff and defendant and the American Steamship Owners Mutual Protection and Indemnity Association Inc., entered into an agreement authorizing the compromise and settlement of the claims of the crew members referred to above, who had brought suit against the plaintiff. Thereafter, on November 25, 1952, December 2, 1952, and March 4, 1953, plantiff settled with these seamen in the total amount of $45,000. It sues for this amount, plus expenses incurred in the defense of said suits, including attorneys' fees.

We agree with plaintiff that its right of action is on the War Risk Protection and Indemnity insurance policy. The charter party provided that the defendant "agreed to provide and pay for or assume war risk protection and indemnity insurance." The policy was issued in pursuance to this agreement. When it was issued the agreement was satisfied, and, therefore, of course plaintiff's right of action is on the policy. But, according to the Act of June 29, 1940

(54 Stat. 689; 46 U. S. C. 1128), under which such insurance was authorized, an action on such a policy had to be brought in the District Court. *Levine* v. *United States,* 112 C. Cls. 187; cert. den. 336 U. S. 936, and cases cited therein.

Plaintiff's reply to this is that the Act of June 29, 1940, *supra,* was repealed by the Joint Resolution of July 25, 1947 (61 Stat. 449, 450), and that the liability of the United States on said policy did not arise until after the repeal; and, hence, the provision for the bringing of an action on the policy in the District Court was not in force and effect when this action was brought. It says that the policy did not insure plaintiff against liability, but against loss, and that there was no loss until the seamen were paid on November 25, 1952, December 2, 1952, and March 4, 1953. Since this was after the repeal of the Act of June 29, 1940, *supra,* giving exclusive jurisdiction to the district courts, it says that these courts do not have exclusive jurisdiction of this action.

This position is not well taken. The War P & I binder was issued while the Act of June 29, 1940, *supra,* was in force, and the Joint Resolution of July 25, 1947 did not attempt to terminate such a policy or to extinguish any liability, potential or perfected, that may have been incurred under it.

Moreover, section 13 of the Revised Statutes, as amended, Act of July 30, 1947 (61 Stat. 633, 635), provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. • • •

So that, both the policy and the Act under which it was issued were in full force and effect when defendant's inchoate liability to plaintiff on account of the sinking of the

vessel and the capture of members of its crew became fixed and definite by the compromises entered into with these seamen and by the payments made pursuant thereto.

That Act gave the district courts exclusive jurisdiction of suits on such policies.

It could hardly be conceived that Congress by the Joint Resolution of July 25, 1947, *supra,* meant to extinguish a liability under the policy already incurred, subject only to the confession or adjudication of liability and the determination of the amount and its payment. It is at least doubtful that it could have done so constitutionally. *De La Rama Steamship Co.* v. *United States,* 344 U. S. 386.

The rationale of that case is applicable here. It was there conceded by the Government that its liability under such a policy "Survived the Joint Resolution" of July 25, 1947. The Supreme Court agreed. It also held that, not only the liability survived, but also the means for enforcing that liability.

The only distinctions between that case and this case are that the petition in that case was filed before the repeal, whereas in this case it was filed after the repeal, and here the policy was one of indemnity; but these distinctions are immaterial. The material fact in both cases is that the event giving rise to the liability happened while the policies were in force and before the repeal of the Act under which they were issued.

See also *Field* v. *United States,* 125 C. Cls. 559, cert. den. 346 U. S. 922; and *M. & J. Tracy, Inc.* v. *United States,* 125 C. Cls. 70, cert. den. 346 U. S. 854.

Defendant's motion to dismiss is granted, and plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 503

UNITED STATES LINES COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. 15-18), dated October 5, 1954, is reported at 124 F. Supp. 375.

JURISDICTION

The judgment of the United States Court of Claims was entered on October 5, 1954. The petition for a writ of certiorari was filed on December 31, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction over a claim with respect to which, as disclosed in the petition for a writ of certiorari, the petitioner also has pending a suit in a United States District Court.

STATUTE INVOLVED

28 U.S.C. 1500 provides:

> § 1500. *Pendency of claims in other courts.*
>
> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

On April 10, 1953, petitioner filed in the Court of Claims a suit on a War Risk Protection and Indemnity policy. The Court of Claims dismissed the complaint on the authority of the decision of this Court in *De La Rama SS Co.* v. *United States,* 344 U.S. 386, on the ground that under the War Risk Insurance Act of June 29, 1940 (54 Stat. 689, 690-691), the United States District Court had exclusive jurisdiction. (Pet. 17-18.) The court also cited (Pet. 18) *Field* v. *United States,* 125 C. Cls. 559, certiorari denied, 346 U.S. 922, and *M. & J. Tracy, Inc.* v. *United States,* 125 C. Cls. 70, certiorari denied, 346 U.S. 854, thus appearing to indicate

that, even if the War Risk Insurance Act were inapplicable, the action was on a maritime contract so that the District Court would have exclusive jurisdiction under the Suits in Admiralty Act.[1]

The petition discloses (at p. 11) that petitioner has also filed a libel for the same claim under the Suits in Admiralty Act in the United States District Court for the Southern District of New York. Petitioner is referring to a libel in admiralty filed July 2, 1953, Docket A 178-311 (*infra*, Appendix A, pp. 6-14). A perusal of this libel confirms that it seeks to recover claims identical with the ones which form the subject of this petition.[2]

ARGUMENT

We submit that the decision of the Court of Claims, holding that the War Risk Insurance Act

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[1] On the same day the Court of Claims decided three other cases involving jurisdictional issues related to those raised in this petition and which are now before this Court on petitions for a writ of certiorari. *Waterman SS Corp.* v. *United States*, No. 501; *Waterman SS Corp.* v. *United States*, No. 502; *Lykes Bros. SS Co.* v. *United States*, No. 513. We have obtained an extension of the time to answer those petitions, since two cases involving the identical issues were argued before the Court of Appeals for the Second Circuit on December 15, 1954, and are now awaiting decision. If possible, it appears desirable to delay our response to those petitions until it can be determined whether there would be a conflict of decisions between the Court of Claims and the Second Circuit.

[2] Petitioner is incorrect in its assertion that in the District Court suit the Government asserted that suit would not lie in the District Court under the Suits in Admiralty Act (see Pet. 11). On the contrary, the Government's answer in that suit admitted that the Suits in Admiralty Act was applicable, although it did deny jurisdiction under the War Risk Insurance Act.

deprived it of jurisdiction, was clearly correct and supported by pertinent precedent. In the alternative, the Suits in Admiralty Act is applicable and bars suit in the Court of Claims.

The petition, however, discloses another ground which peremptorily defeats the jurisdiction of the Court of Claims. It is now a matter of record that petitioner filed another suit for the same claim in another court and thus the Court of Claims has lost jurisdiction of the cause by reason of 28 U.S.C. 1500, *supra*, p. 2.[3]

As this Court pointed out recently in *Calmar S. S. Corp.* v. *United States*, 345 U.S. 446, 455, fn. 7, it is the very purpose of 28 U.S.C. 1500 to prevent hedging on the part of the litigant by the expedient of filing suits in the Court of Claims under the Tucker Act and in the District Court under the Suits in Admiralty Act.

The application of 28 U.S.C. 1500 is not defeated by the circumstance that petitioner did not file the libel in admiralty before or simultaneously with the institution of the action in the Court of Claims, but eleven weeks later. The policy underlying 28 U.S.C. 1500 cannot be circumvented that easily.

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[3] *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-356, holding that Section 154 of the Judicial Code (28 U.S.C. (1946 ed.) 260), the predecessor of 28 U.S.C. 1500, does not bar a suit against the United States in the Court of Claims where another suit against the United States has been filed in the District Court because Section 154 referred only to suits filed against a person "acting * * * under the authority of the United States," is no longer applicable in view of the new statutory language of 28 U.S.C. 1500, expressly referring to suits against the United States in another court.

This Court has held that the filing of a second complaint ousts whatever jurisdiction the Court of Claims might have had. Thus, even a second complaint filed after dismissal in the Court of Claims is fatal to a review in this Court, *Corona Coal Company* v. *United States,* 263 U.S. 537, and it prevents a reopening of the case, *Ex Parte Skinner & Eddy Corp.,* 265 U.S. 86, 95.[4]

The Court of Claims thus lost jurisdiction over this case on July 2, 1953, the day petitioner filed its libel in admiralty.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1955.

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[4] While 28 U.S.C. 1500, in contrast with Judicial Code, Section 154 (28 U.S.C. (1946 ed.) 260) does not in terms bar review in the Supreme Court, the Revisers' Note states that the "words 'or in the Supreme Court on appeal therefrom' were omitted as unnecessary" 28 U.S.C. 1500, Legislative History; H. Rep. No. 308, 80th Cong. 1st Sess., p. A. 140. In any event, here, in contrast to *Corona Coal Co.* v. *United States, supra,* the second action was filed in the District Court long before the dismissal of the case in the Court of Claims.

APPENDIX

PETITIONER'S DISTRICT COURT LIBEL

(Filed July 2, 1953)

To the Honorable the Judges of the United States District Court for the Southern District of New York

The libel of the United States Lines Company against the United States of America, in a cause of action, civil and maritime, alleges upon information and belief as follows:

FIRST: Libelant is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business at One Broadway, New York, New York. Prior to May 29, 1943, United States Lines Company was a Nevada corporation and International Mercantile Marine Company was a New Jersey corporation. On May 29, 1943, United States Lines Company, the Nevada corporation, merged into International Mercantile Marine Company, the New Jersey corporation, which was thereafter and still is known as United States Lines Company.

SECOND: That at all times hereinafter mentioned, the respondent, United States of America, acting by and through the Administrator of the Maritime Administration, Department of Commerce (as successor to the Administrator of War Shipping Administration and the United States Maritime Com-

mission) was and still is a corporation sovereign which has consented to be sued herein under the Suits in Admiralty Act.

THIRD: On or about the 7th day of February, 1952, by a valid Executive Order No. 9054 of the President of the United States, issued pursuant to the First War Powers Act, 1941, the President established the War Shipping Administration under the direction of an administrator appointed by the President, and transferred to and vested in said administrator certain functions, duties and powers of the United States Maritime Commission, including the functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repairs, maintenances and requisitions of vessels under the Merchant Marine Act, 1936, as amended. From said time (February 7, 1942) until the 1st day of September, 1946, said control and said functions, duties and powers remained vested in and were exercised by said administrator and by said War Shipping Administration under his direction. On the 1st day of September, 1946, said control, functions, duties and powers devolved upon, or were vested in the United States Maritime Commission. On the 24th day of May, 1950, said control, functions, duties and powers were transferred to and vested in the administrator of the Maritime Administration, Department of Commerce (hereinafter called the "administrator").

FOURTH: On March 10, 1942 and thereafter through September 10, 1942, the motor vessel

AMERICAN LEADER was owned, managed and controlled by the United States Lines Company.

FIFTH: On March 10, 1942 and thereafter through September 10, 1942, the motor vessel AMERICAN LEADER was being operated for the administrator of the War Shipping Administration by the United States Lines Company, in accordance with a time charter agreement, contract No. WSA-2074-R, dated as of April 4, 1942, with the United States of America and signed for United States of America by the administrator of the War Shipping Administration. By the terms of said charter, the administrator of the War Shipping Administration agreed to provide and pay for or assume war risk protection and indemnity insurance with respect to said vessel for the benefit of the United States Lines Company and of the administrator of the War Shipping Administration.

SIXTH: Pursuant to said charter party and in carrying out his obligation under said charter party, the administrator of the War Shipping Administration on September 14, 1952, issued to the United States Lines Company, a war risk binder, No. R. C. 594 Amended, which included "War P and I" and which specifically provided that it should cover the United States Lines Company retroactively commencing April 4, 1942, with respect to the MV AMERICAN LEADER. A copy of this is annexed here to marked Exhibit "Y."

SEVENTH: At the time said binder issued with its retroactive application to April 4, 1942, the United States of America had in its files a form of war

risk protection and indemnity policy which was intended and accepted by it as the P & I policy described by the phrase in the binder, "War P & I". A copy of said policy is annexed hereto and marked Exhibit "X".

EIGHTH: Thereafter the United States of America issued and published a war protection and indemnity policy identical with that referred to in paragraph SEVENTH herein which was intended to and did have retroactive force and effect as the "War P and I" policy referred to in the war risk binder described in article SIXTH herein. Copy of said policy is annexed hereto and marked Exhibit "X".

NINTH: That said war risk binder, as well as the policy, provided that United States Lines Company was insured with respect to the MV AMERICAN LEADER for whatever was excluded from its marine P and I policy by the following clauses:

"Article IX

"Section 2. The Association shall not be liable for any loss, damage or expenses sustained, directly or indirectly, by reason of:

"(a) * * *

"(b) * * *

"(c) * * *

and, unless otherwise agreed in writing,

"(d) Capture, seizure (except seizure under Article IX, Section 1, Sub-Sec. 10), arrest, restraint or detainment, or the consequences thereof, or of any attempt thereat, or the con-

sequences of hostilities or war-like operations, whether before or after the declaration of war; * * *."

TENTH: That on March 10, 1942, there was furnished to the United States of America, the United States Lines Company's marine P and I policy with respect to the MV AMERICAN LEADER which included the clause quoted in article NINTH above.

ELEVENTH: On March 10, 1942, and on April 4, 1942, and on September 14, 1942, when the war risk binder was issued, it was the intention of both the United States Lines Company and the United States of America that the "war P and I" contracted to be furnished by the United States of America to the United States Lines Company should cover the risks excluded from the said marine P and I policy by the clause quoted in article NINTH above.

TWELFTH: On March 10, 1942, and on April 4, 1942, and on September 14, 1942, when the war risk binder was issued, it was a well known and wide-world custom known to both the United States Lines Company and to the United States of America that when war risk protection and indemnity insurance was written, it was written to cover all of the protection and indemnity risks excluded from an assured's marine protection and indemnity policy.

THIRTEENTH: On September 10, 1942, while on a voyage bound from Capetown to New York, the motor vessel AMERICAN LEADER was shelled, torpe-

doed and sunk by a German enemy surface raider, and certain members of her crew who survived sustained personal injury as a result thereof and were taken captive aboard the German enemy surface raider and thereafter delivered to the Japanese and imprisoned and interned as prisoners of war. Among these crew members were all of the individuals referred to in articles FOURTEENTH and NINETEENTH below.

FOURTEENTH: At the termination of hostilities and upon their repatriation to the United States, certain members of the crew of the motor vessel AMERICAN LEADER, hereinafter named, brought civil and admiralty actions against their employer, the United States Lines Company, to recover damages for injuries allegedly arising out of the events during, surrounding, and following the sinking of the AMERICAN LEADER, including capture and imprisonment.

FIFTEENTH: Subsequently and on the 13th day of October, 1952, an agreement was made by and between the United States Lines Company, the United States of America, and the American Steamship Owners Mutual Protection and Indemnity Association, Inc., labelled and identified as Contract No. M. A. 510, wherein and whereby it was provided that the claims of the crew members who had brought suit against the United States Lines Company, were to be compromised and settled under and pursuant to the terms and conditions set forth in said agreement.

SIXTEENTH: That the loss, damage and expense

of the United States Lines Company referred to in said agreement was sustained "directly or indirectly, by reason of: * * * Capture, seizure, * * * arrest, restraint or detainment, or the consequences thereof, or of any attempt thereat, or the consequences of hostilities or war-like operations, * * *" within the meaning of section 2 of the By-Laws quoted in article NINTH herein and of paragraph 25 of Exhibit "X" herein each of which paragraphs excluded such loss, damage and expense from coverage by the marine P and I underwriter, and by reason of the war risk binder, and policy, the said loss, damage and expense so excluded from the marine P and I policy, became the direct obligation of the United States of America as war P and I insurer.

SEVENTEENTH: That the liability of United States Lines Company to the said seamen in the aforesaid suits and the sums paid in compromise and settlement of said suits, together with the expenses incurred in connection with the defense of said suits, including attorneys' fees, were within the risks covered by said war risk protection and indemnity insurance provided by the United States of America, and the United States Lines Company is entitled to be indemnified by the United States of America, in accordance with the terms and conditions of said war risk protection and indemnity insurance.

EIGHTEENTH: It is provided in the aforesaid agreement, Contract No. MA 510, that the United States Lines Company, shall commence suit against

the United States of America within one year after it has paid any particular member of the crew who brought suit against the United States Lines Company.

NINETEENTH: Payment was made by the United States Lines Company to the crew members who brought suit against the United States Lines Company, as follows:

Name of Crew Member	Amount	Date of Payment
Guiseppe Savouca	$3,000.00	November 25, 1952
John Porchia	3,000.00	November 25, 1952
Pasquale A. Trotta	3,000.00	November 25, 1952
Michael J. Zombeck	3,000.00	November 25, 1952
Christopher Walsh	3,000.00	November 25, 1952
Joseph Cohen	3,000.00	November 25, 1952
Robert James Reilly	3,000.00	November 25, 1952
Alexander Angus McKinnon	3,000.00	November 25, 1952
Frank Patocka	3,000.00	November 25, 1952
Henry Silva	3,000.00	November 25, 1952
Kenneth J. Pride	3,000.00	November 25, 1952
Anthony Marcinkus	3,000.00	November 25, 1952
Ernest D'Ambrose	3,000.00	November 25, 1952
Carl H. Kalloch	3,000.00	December 2, 1952
Frank Hiza	3,000.00	March 4, 1953

TWENTIETH: That this action is commenced within one year after said payments were made.

TWENTY-FIRST: That the United States Lines Company, has made demand upon the United States of America, acting by and through the administrator of the Maritime Administration, for reimbursement for said payments made to said crew members as aforesaid, and for its expenses and for its attorneys' fees and disbursements in connection with said suits by the aforesaid crew members, but said demand has been refused and payment has not been made.

TWENTY-SECOND: United States Lines Company has duly performed all of the obligations on its part to be performed under the war P and I insurance and Exhibit "X" annexed hereto and all conditions precedent to the bringing of this action.

WHEREFORE, libelant prays for a decree in the sum of Sixty-Four Thousand Four Hundred Ninety-One and 97/100 ($64,491.97) Dollars, together with interest and the costs and disbursements of this action, and for such other or further relief as may be just.

KIRLIN CAMPBELL & KEATING,
Proctors for Libelant.
Office & P. O. Address,
120 Broadway, New York 5, N. Y.

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FEB 10 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 503

UNITED STATES LINES COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY BRIEF OF PETITIONER UNITED STATES LINES COMPANY.

In its brief in opposition to the petition for a writ of certiorari, the United States raises Section 1500 of Title 28 U. S. C., for the first time. In the court below it was pointed out that the United States Lines Company had filed a libel against the government in the United States District Court for the Southern District of New York. However, the government did not urge that the petition in the Court of Claims be dismissed because of the pendency of the libel in the district court. While fully cognizant of the fact that there was another action pending against the United States in the district court, the Court of Claims did not dismiss the petition on that ground. It decided the case only on the ground that the War Risk Insurance Act deprived it of jurisdiction and that the suit was cognizable in the district court under the Suits in Admiralty Act.

The question presented is not that set forth on page 2 of the government's brief, but is that raised by the Court of Claims which resulted from the motion of the government to dismiss on the ground that the War Risk Insurance Act deprived it of jurisdiction.

Section 1500 does not bear the construction the government wishes to place upon it. In its present form, it is similar to a plea in abatement which must be pleaded. *Cf. City of No. Muskegon* v. *Clark,* 62 Fed. 696, 698. In the court below the government deliberately refrained from raising the issue, and it is submitted that this constitutes a waiver.

The government must also recognize that Section 1500 can be waived for if there is any substance to their present contention that the Court of Claims was without power to proceed, merely because of the existence of the District Court action, it would, in effect, amount to a device to lure the Court of Claims into delivering an advisory opinion. Surely, the government does not take that position.

The use of the word "jurisdiction" in Section 1500 does not have special significance. It certainly does not mean that the court below did not have jurisdiction as a Court of Claims to determine the question. Nor can it mean that the Court of Claims does not have jurisdiction of the subject matter of the suit, for it obviously does. As it is presently phrased, the word "jurisdiction" in Section 1500, is similar to the use of the word in the Jones Act. (Sec. 20 of the Act of June 5, 1920, c. 250; 46 U. S. 688.) The contention now made by the government was also raised in *Panama Railroad Company* v. *Johnson,* 264 U. S. 375. At page 383 the court said:

> "* * *. The objection (to jurisdiction) was not made at the onset on a special appearance, but after the defendant had appeared generally and demurred

> to the complaint. The court thought the objection went to venue only and was waived by the general appearance; so the objection was overruled. 277 Fed. 859. Error is assigned on the ruling; but we think it is right." (Matter in parenthesis added.)

This construction of Section 1500 fits into the present policy of Congress to give redress where rights have been violated.

The present phraseology of Section 1500 of Title 28 U. S. C. is vastly different than the language of the predecessor statute, and fits in with the purpose of Congress in retreating from the harsh doctrine of sovereign immunity. In the framework of such a policy, it cannot be argued that Congress intended to deprive litigants of rights against the United States where serious jurisdictional questions were yet unsolved by the Supreme Court. As appears from the petition for a writ of certiorari, the questions presented are important, are not isolated, and should be solved by this court.

It is submitted that as it is presently worded, Section 1500 should be construed to mean that the Court of Claims shall not have jurisdiction only in cases where there is no question that "the plaintiff or his assignee *has pending* in any other court, any suit or process against the United States". In order to determine whether a suit is *pending*, it is necessary for this court first to decide whether the court does, in fact, have jurisdiction of the suit.

This Court may review the questions because Section 1500 no longer presents the statutory bar which was found in the predecessor statute, 28 U. S. C. (1946 ed.) 260, which prevented this Court from reviewing such questions. By deleting the words "or in the Supreme Court on appeal therefrom" Congress must have so intended.

Conclusion.

It is respectfully submitted that the government has waived Section 1500, of Title 28 U. S. C. or is estopped from asserting it in this court. The petition for a writ of certiorari should be granted.

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James B. Magnor,
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